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Supreme Court of the United States

October Term, 1970

No. 1271

DELLA DAVIS, THEODORE MARKOWITZ, and JACK GUILD,

Petitioners,

—against—

THE NEWS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

The order of the Court of Appeals (Pet. App. 1a) and the opinion of the District Court (Pet. App. 2a-6a) are unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on October 26, 1970. The petition for writ of certiorari was filed on January 25, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether the Court of Appeals properly dismissed petitioners' appeal for lack of jurisdiction from the District Court's denial of summary judgment on the ground that material facts remained in issue.

Statement

By way of summary, petitioners are but three of more than fifty plaintiffs who commenced this antitrust action in March 1967, alleging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2), Section 3 of the Clayton Act (15 U.S.C. §14), and Section 1 of the Robinson-Patman Amendment to the Clayton Act (15 U.S.C. §13), based on The News' efforts to institute a suburban home delivery franchise system. The complaint seeks relief in the form of treble damages and preliminary and permanent injunctions, although petitioners have never moved for injunctive relief.

On May 12, 1970, petitioners moved for summary judgment in the United States District Court for the Southern District of New York relying primarily upon the decision of this Court in *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968). The motion was denied on the ground that petitioners had failed to "show the required absence of a genuine issue as to any material fact" (Pet. App. 5a).

On October 26, 1970, the Court of Appeals dismissed, without opinion, petitioners' appeal from the District Court's decision for lack of jurisdiction.

The facts alleged to be "uncontroverted" in petitioners' statement of "Questions Presented for Review" are disputed and were disputed in the District Court. Specifically, The News denied that it ever fixed or sought to fix the resale price at which petitioners resold its newspapers. After sales to petitioners were discontinued as a result of a unilateral decision by The News, fair trade agreements authorized by New York State law were entered into by The News with franchise dealers providing for resale at a stipulated price.

Argument

The District Court denied petitioners' motion for summary judgment on the ground that:

> [T]he following material facts, among others, remain in issue:
>
> A) Whether The News made a "wholly unilateral" decision to refuse to sell newspapers to plaintiffs . . . ;
>
> B) Whether The News tried to "force [plaintiffs] to maintain a specified price for resale" of The News . . . (Pet. App. 5a).

Petitioners' assertion that these two issues are not material is untenable, for in *Albrecht* v. *Herald Co., supra*, 390 U.S. at 149 and 153, on which petitioners rely, this Court expressly held that the issues referred to by the District Court were material with regard to the ultimate issue of whether or not the newspaper company there was guilty of illegal price-fixing, the very claim on which petitioners here sought summary judgment.

Furthermore, the facts established in *Albrecht* after a trial are significantly different from even the disputed factual assertions raised by affidavits here. Two significant differences are: (1) In *Albrecht*, the newspaper was found to have conspired with others to force the plaintiff to resell at a fixed maximum price, whereas here, the alleged unlawful agreements were not with petitioners but with dealers who had replaced them as a result of The News' unilateral decision to change its system of home delivery distribution; (2) In *Albrecht*, there was no reliance by defendant, as there is here, upon a state fair trade law under which the agreements to maintain a stipulated price are exempted from the prohibitions of the Sherman Act by the McGuire Act (15 U.S.C. §45).

Petitioners claim that the Second Circuit's dismissal of the appeal for lack of jurisdiction was improper. But their assertion is utterly without merit for it is settled law that a court of appeals does not have jurisdiction to hear the appeal from a denial of summary judgment based on the existence of material issues of fact.

As this Court recently reiterated in *Goldstein* v. *Cox*, 396 U.S. 471, 475 (1970):

> In construing the . . . provision giving the courts of appeals jurisdiction to hear appeals from interlocutory orders granting or denying injunctions, 28 U.S.C. §1292(a)(1), this Court has ruled that a denial of summary judgment is not an appealable order denying an injunction, at least where the denial is based upon the existence of a triable issue of fact. *Switzerland Assn.* v. *Horne's Market*, 385 U.S. 23 (1966).

See also *Chappell* v. *Frankel*, 367 F.2d 197, 199-200 (2d Cir. 1966) and *Morgenstern Chemical Co.* v. *Schering Corp.*, 181 F.2d 160 (3d Cir. 1950).

In any event, the District Court's denial of summary judgment was not a denial of an injunction for, although the complaint asks for injunctive relief, in the four years since petitioners and other plaintiffs commenced this action no motion for an injunction has been made. Furthermore, petitioners sought no injunction on their summary judgment motion. Indeed, their moving papers recited none of the traditional elements required for the granting of an injunction.

Finally, petitioners' suggestion that "consideration of the summary judgment motion on appeal . . . may result in speedier justice" (Pet. 11) is completely unwarranted. Petitioners are in a substantially identical posture as the other twenty odd plaintiffs remaining in this action. Summary judgment, whether granted or denied, on the one legal theory out of many raised by the motion, would not have avoided the need for a trial. Furthermore, had petitioners diligently pursued their causes of action, a trial could already have been concluded and petitioners would not now be faced with the possibility of an order of dismissal for want of prosecution.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ANDREW L. HUGHES
Attorney for Respondents

10 February 1971